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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

..... TERM, 196..

NO. 672

JOSEPH GRANDINETTI and THERESA GRANDINETTI, Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Joseph Grandinetti and Theresa Grandinetti, by their counsel, John B. Nicklas, Jr. of McCrady & Nicklas, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, affirming the judgments of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals was filed October 14, 1964, and is appended hereto, in accordance with Rule 23, subparagraph 1 (a) (i) of your Honorable Court.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit were entered on October 14, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

I. May a criminal conviction for income tax evasion by husband and wife be sustained where the proof offered by the Government consisted solely of circumstantial evidence based on the use of the net worth method of proof, without any independent proof of willfulness but merely failure to include all their income because of insufficient knowledge or education to keep accurate books?

II. In such an action, did the trial court improperly fail to charge the jury that, the Government's evidence being circumstantial, the jury must exclude every reasonable hypothesis other than that of guilt before it could convict the defendants?

III. Is it a violation of due process to permit a Government agent's written net worth computation to go out with the jury, where no opportunity for pretrial conference or otherwise was afforded defendants' counsel to study the computation prior to trial, particularly where the Government agent fails to show the source, description and basis for the figures?

IV. Did the trial judge commit prejudicial and fundamental error in allowing the jury to have work

sheets or summaries of checks prepared by the Government agent from microfilm and records obtained by him from the bank, about which he interrogated the wife defendant at her home prior to these proceedings and elicited answers based entirely from her memory as to transactions for which the checks were allegedly given, particularly when no opportunity was afforded defense counsel, by pretrial procedure or otherwise, to examine these exhibits to determine their content and accuracy?

STATUTES INVOLVED

Internal Revenue Code:

Section 7201. Attempt to Evade or Defeat Tax.

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution. (26 U.S.C. 7201)

Section 446. General rule for methods of accounting.

(a) General rule.—Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

(b) Exceptions.—If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income.

(c) Permissible methods. — Subject to the provisions of subsections (a) and (b), a taxpayer may compute taxable income under any of the following methods of accounting:

(1) the cash receipts and disbursements method;

(2) an accrual method;

(3) any other method permitted by this chapter; or

(4) any combination of the foregoing methods, permitted under regulations prescribed by the Secretary or his delegate.

(d) Taxpayer engaged in more than one business.—A taxpayer engaged in more than one trade or business may, in computing taxable income, use a different method of accounting for each trade or business.

(e) Requirement respecting change of accounting method.—Except as otherwise expressly provided in this chapter, a taxpayer who changes the method of accounting on the basis of which he regularly computes his income in keeping his books shall, before computing his taxable income under the new method, secure the consent of the Secretary or his delegate. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 151 (26 U.S.C. Section 446)

STATEMENT OF THE CASE

The petitioners, Joseph Grandinetti and Theresa Grandinetti, his wife, were indicted and convicted under Section 7201 of the Internal Revenue Code (26 U.S.C. Section 7201), charging them with wilfully and knowingly attempting to evade and defeat a large part of the income tax due and owing by them to the United States of America for the calendar years 1956, 1957, 1958 and 1959, by filing with the District Director of Internal Revenue at Pittsburgh, Pennsylvania, false and fraudulent joint income tax returns for said years. The petitioner Joseph Grandinetti was sentenced to imprisonment for a period of one year and one day on each of the four counts (sentences to run concurrently) and to pay a fine of $1200 on each count, or a total fine of $4800; Theresa Grandinetti was sentenced to undergo imprisonment for a period of six months on each count (sentences to run concurrently) and to pay a fine of $1200 on each of the four counts, or a total fine of $4800, but upon payment of the fine within thirty days the imprisonment sentence to be suspended (Tr. 574).

Joseph Grandinetti was born in Italy on February 24, 1904; came to this country when he was 15 years old, and is now 60 years old. He had but three years of schooling in Italy (Tr. 500, 501). He started in the shoe repair business when he was 16 years of age, within a few months after he came from Italy (Tr. 503). He speaks English with difficulty and cannot read or write the English language (Tr. 505).

He married Theresa Grandinetti in June of 1940. The Grandinettis have four children, ages 21, 19, 17 and 8 years (Tr. 431).

Statement of the Case.

About six or seven years after the marriage, Joseph Grandinetti gave up the shoe repair businss and branched out into a retail shoe store business called Mountain City Bootery (Tr. 36), which he still operates in Kane, Pennsylvania (Tr. 434).

Mathilda C. Vaccaro, Theresa Grandinetti's sister, started the investigation by the Internal Revenue Servive of the petitioners' income tax returns by writing a letter on May 18, 1959, asking the Internal Revenue Service to check the Grandinetti income tax returns from the years 1940 to 1958 (Tr. 297, 300, 301). Mrs. Vaccaro admitted that there was bad blood between her and her sister, particularly over an estate of her sister, Mary Frances Caligiuri, which has been in litigation in Pittsburgh since 1959 (Tr. 297).

The Government investigation was conducted by Charles W. Matchett, an Internal Revenue Agent who was assigned to the case, in June of 1960 (Tr. 30). Mr. Matchett first contacted Mr. Grandinetti at his store in Kane, Pennsylvania, on July 21, 1960 (Tr. 30), and also interviewed Mr. A. B. Dickman, an accountant who had prepared the Grandinetti returns.

Mr. Grandinetti explained to Mr. Matchett the daily sheets which were kept by Ruth V. Jones, Mr. Grandinetti's employee in the shoe store since 1934 (Tr. 92), which consisted of the cash sales shown by the cash register tape, the credit sales made each day, and also a record of the credit sales which were paid. These daily sheets were bundled together at the end of the month by Miss Jones and delivered to Mrs. Grandinetti, who made up from these records a work sheet of income tax

data, which in turn was delivered to Mr. Dickman, the accountant who made up the income tax returns.

An explanatory letter was offered in evidence as Government's Exhibit 7, received by Mr. Matchett in August of 1960 from Mrs. Grandinetti, who frankly admitted that she didn't understand the system used because she was not a bookkeeper, but that they got their bills paid (Tr. 37, 38). In that letter Mrs. Grandinetti volunteered to explain anything which Mr. Matchett did not understand if he would communicate with her (Tr. 38).

Mr. Matchett worked on the case until September of 1960 when it was assigned to another agent (Tr. 45).

Theodore A. Givler of the Intelligence Division of Internal Revenue Service, having been assigned to the Grandinetti case, began his investigation by contacting Mr. Grandinetti on September 19, 1960. He had a number of interviews with both petitioners who admittedly produced whatever records requested, and available information as to the procedures used in preparing the returns. Agent Givler stated that Mrs. Grandinetti reduced the total sales for the year as shown by the daily sales reports by 35%, as well as the total of the purchases taken from the check stubs representing paid invoices (Tr. 320). She also reduced the inventory furnished to her by Mr. Grandinetti by 35%. This was done to take care of the merchandise sold at a discount at special sales held twice a year (Tr. 321). Agent Givler reviewed the check stubs of the Grandinetti's personal checking account as well as the Mountain City Bootery checking account, made a list thereof for each of the four

years in question, namely, 1956, 1957, 1958 and 1959, and in an interview with Mrs. Grandinetti asked her to indicate her recollection as to what each check was for. The lists thus compiled were offered in evidence, without objection, as Government Exhibits 21 to 25 inclusive (Tr. 321, 328).

Agent Givler then separated the checks shown on Exhibits 21 through 25 which had been identified according to his testimony by Mrs. Grandinetti for personal nondeductible use. These analyses were identified as Exhibits 26 to 29 inclusive, for the same four years, and were also offered in evidence without objection by defense counsel (Tr. 329, 340). From this data and the income tax returns for the same four years (Exhibits 3 to 6 inclusive) (Tr. 19, 20), Mr. Claude G. Bunce, an agent employed by the Internal Revenue Service at Warren, Pennsylvania, to conduct audits of income tax returns, compiled a "Summary of income determined by use of net worth method" (Exhibit 30) (Tr. 382, 384), and Walter A. Lipski, another Internal Revenue Agent in the Erie Office of the Internal Revenue Service, computed the deficiency income tax of the Grandinettis based on the increase in taxable income computed by Agent Bunce in his net worth summary (Exhibit 30). Mr. Lipski's tax computation appears as Government Exhibit 31 (Tr. 395, 396).

The Grandinetti's income came from two sources: The shoe store and rentals from business properties which they owned. Agent Givler admitted that th[illegible]rcss rental receipts from the business properties all checked out (Tr. 359); that he found nothing had been paid by

the Grandinettis in cash to hide the transactions (Tr. 360); that he had no reason to doubt the authenticity of the bank deposits since he did not ask to see the deposit books (Tr. 361); that he found errors in Mr. Grandinetti's check book in that the bank balances were not correctly shown therein; that he didn't check, however, his subtractions (Tr. 361); that he had no trouble in getting the Grandinetti's permission to interview Attorney James C. Bly who had handled the Grandinetti's real estate purchases and who properly did not wish to reveal any information on the grounds of privilege between attorney and client without the Grandinetti's consent (Tr. 365).

Although the investigation of Grandinetti's income tax returns commenced in July of 1960, they did not retain counsel until February 1962 (Tr. 365). Furthermore, the Grandinettis voluntarily attended a Regional Conference in Philadelphia and another one in Erie, with Agents Givler and Bunce and a reporter present, to furnish any information requested (Tr. 367). Agent Givler further testified that Mrs. Grandinetti readily admitted that, in making up her income tax data for Mr. Dickman, the accountant, she understated her rents from the business properties from $2,000 to $3,000 each year because the Grandinettis spent that much to improve these rental properties; this was her way of providing for repairs and depreciation (Tr. 342).

At the conclusion of the Government's case, defense counsel (Philip F. Jacobus, Esq., of Kane, Pennsylvania) moved for a directed verdict of acquittal, which motion was refused by the trial judge (Tr. 399).

At the conclusion of the petitioners' case, a motion for directed verdict of acquittal was again made by defense counsel, and denied (Tr. 535).

After the jury's verdicts of guilty, new trial motions were filed assigning some sixteen reasons in support thereof, which motions were also denied, without any opinion being filed by the trial judge.

Appeals were taken to the United States Court of Appeals for the Third Circuit, argued by present counsel for the petitioners before Circuit Judges Hastie and Forman and District Judge Kirkpatrick. On October 14, 1964, the judgments of the District Court were affirmed.

REASONS FOR ALLOWANCE OF THE WRIT

I

The Government's circumstantial evidence failed to prove a willful, false and fraudulent attempt necessary for conviction under Section 7201 of the Internal Revenue Code, but at the most supported a mere understatement of income by the taxpayers under circumstances which were consistent with innocent mistake rather than willful violation.

The decision of the Court of Appeals raises several questions of substantial importance, particularly in the prosecution of criminal tax evasion cases, and is in conflict with a number of decisions of the Supreme Court of the United States and other Courts of Appeal.

(a) The decision of the Court of Appeals is in conflict with decisions in three other Circuits holding that, where the prosecution attempts to establish an understatement of income by the net worth method, the case should not be submitted to the jury if the starting point net worth is not definitely established. *Bryan v. United States,* 175 F. 2d 223 (C.A. 5), affirmed without considering the point in issue here, 338 U.S. 552; *United States v. Fenwick,* 177 F. 2d 488 (C.A. 7); *United States v. Calderon,* 207 F. 2d 337 (C.A. 9); *Holland et ux. v. United States,* 348 U.S. 121 (C.A. 10).

(b) The decision of the Court of Appeals conflicts in principle with the decision of the United States Circuit Court of Appeals (Ninth Circuit) in *Remmer v. United States,* 205 F. 2d 277 (reversed on other grounds, 22 L.W. 4142). While upholding the taxpayer's conviction in the Remmer case, the Court of Appeals recognized

the principle that "The net worth method of computing income may be used only where a taxpayer does not keep books or such books are inadequate in that they do not clearly reflect income."

(c) In limiting the Government's burden to that of discrediting defendants' extra-judicial statement, thus requiring the defendants to carry the burden of proof of explaining the Government's computation of income based on the net worth theory, the decision of the Court of Appeals marks a significant departure, from established principles of proof in criminal cases and is in conflict with *United States v. Caserta,* 199 F. 2d 905 (C.A. 3); *United States v. Demetree,* 207 F. 2d 892 (C.A. 5), and *United States v. Fenwick,* 177 F. 2d 488.

(d) The decision of the Court of Appeals is in conflict with decisions of the Court of Appeals for the Fifth, Sixth, Seventh and Eighth Circuits, and the United States Supreme Court, acknowledging the principle that, where a criminal case is based entirely upon circumstantial evidence, the trial court is required to give some sort of instruction to the effect that the evidence must be inconsistent with every reasonable hypothesis but that of guilt. *Garst v. United States,* 180 Fed. 339 (C.A. 4); *Stutz v. United States,* 47 F. 2d 1029 (C.A. 5); *Anderson v. United States,* 30 F. 2d 485 (C.A. 5); *Bryan v. United States,* supra; *Strickland v. United States,* 155 F. 2d 167 (C.A. 5); *McLendon v. United States,* 13 F. 2d 777 (C.A. 6); *Epstein v. United States,* 174 F. 2d 754 (C.A. 6); *United States v. Fenwick,* supra; *Gureva v. United States,* 40 F. 2d 338 (C.A. 8); *Banks v. United States,* 204 F. 2d 666 (C.A. 8); *Holland v. United States,* supra.

(e) The decision of the Court of Appeals is contrary to the former decisions of the Circuit Court and of the Supreme Court of the United States holding that frank admissions of faulty methods of calculation resulting in an underpayment of tax and conduct showing cooperation with Government agents and willingness to pay any deficiencies of tax shows no willful intent, the negation of which by the Government is necessary to convict. *Holland v. United States,* supra; *Haigler v. United States,* 172 F. 2d 986; *United States v. Long,* 257 F. 2d 340 (Pa.); *United States v. Lindstrom,* 222 F. 2d 761; *United States v. Bridell,* 180 Fed. Supp. 268.

As stated in *Holland et ux. v. United States,* supra (syllabus):

> "1. While it cannot be said that the dangers for the innocent inherent in the net worth method of proof foreclose its use, they do require the exercise of great care and restraint.
>
> 2. Trial courts should approach such cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute.
>
> 4. In reviewing such cases, appellate courts should bear constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.
>
> 14. The settled standards regarding the burden of proof in criminal cases are applicable to net worth cases. The Government must prove every

element of the offense beyond a reasonable doubt, though not to a mathematical certainty.

15. In net worth cases, willfulness is a necessary element for conviction. It must be proven by independent evidence and it cannot be inferred from a mere understatement of income."

At page 126:

. . . *There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows*: The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; *bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.*

Your Honorable Court said in *Holland v. United States,* supra (p. 127):

"5. In many cases of this type (net worth theory), the prosecution relies on the taxpayer's statements, made to revenue agents in the course of their investigation, to establish vital links in the Government's proof. But when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer's statement, relying on the favorable portion and throwing aside that which does not bolster its position. The problem of corroboration, dealt

with in the companion cases of Smith v. United States, post, p. 147, and United States v. Calderon, post, p. 160, therefore become crucial."

(f) In upholding the convictions based entirely on net worth evidence, the District Court, as well as the Court of Appeals, ignored the requirements of Section 446 of the Internal Revenue Code. Section 446 by its terms limits the authority of the Government to deviate from the method of accounting selected by the taxpayer to situations where no method of accounting has been employed in keeping a taxpayer's books or where the method employed does not reflect taxable income.

It is crystal-clear from the Government testimony that the woman taxpayer was incapable by education, knowledge, training, or experience to keep books or to compute properly the income tax due; nevertheless, she did have a system of accounting, by means of the daily sales recorded on the cash register slips and the payment of the charge accounts on the back of the daily reports (Exhibit 15, Tr. 88, 89). As stated in the *Remmer case, supra,* the net worth method of computing income may be used only where a taxpayer does not keep books or such books are inadequate in that they do not clearly reflect income. Consequently, where individual items or entries are shown to be in error, the Government is not thereby permitted to substitute a method of accounting different from that employed by the taxpayer. *United States v. American Can Company,* 280 U.S. 412; *Pacific National Company v. Welch,* 304 U.S. 191.

The danger in resorting to the so-called net worth expenditure method under the circumstances in the in-

stant case resulting in the conviction of these petitioners, is frightening to our concept of Anglo-Saxon justice. It is unlikely that in any other field of criminal law, convictions would be allowed to stand on such a pyramid of speculation.

A surprising result therefore follows which is entirely foreign to our basic concept of criminal law, viz., that where a discrepancy arises between *increased net worth* and *reported income,* the burden of proof shifts to the taxpayer, although the usual criminal law rule is that the burden of proof throughout a criminal case is upon the prosecution. *United States v. Caserta,* supra; *United States v. Demetree,* supra.

II

The agent's computations and work summary sheets were inadmissible, prejudicial and violates due process (Art. XIV, Amendment to Constitution of United States).

(a) Unquestionably, defendants were prejudiced by the admission into evidence of Exhibit 30, which was the net worth summary made by Agent Bunce. See *Hartman v. United States,* 215 F. 2d 386. It is most improbable that the jury understood Exhibit 30. Present counsel for petitioners, who did not try the case in the court below, has spent many days and hours of tedious study in endeavoring to assimilate the figures compiled by Agent Bunce. This exhibit was not properly proved and should not have been permitted in evidence; certainly it should not have been allowed to go out with the jury. Government Exhibits 21 to 29 cannot be reconciled with the agent's testimony, and likewise should never have been submitted to the jury.

The jury had before them when deliberating on the case the work sheets of the Government agents (Exhibits 21 to 30 inc.), and the four Grandinetti income tax returns (Exhibits 3 to 6 inc.). It would be impossible for the jury to divorce from their minds the increase in capital income as contended by Agent Bunce on Exhibit 30 and the income shown on the Grandinetti returns for the corresponding years. The discrepancy in the two sheets of figures would have been highly significant had the jury had an opportunity to study the difference between the computations in Exhibit 30 and the total figures developed by the testimony; yet Exhibit

30 went into evidence and went out with the jury without objection or without these discrepancies being revealed.

This points up the very danger of convicting the accused on the serious charge of a felony under Section 7201 by circumstantial evidence and by the net worth method.

In the *Holland* case, supra, your Honorable Court observed:

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows."

(b) Since the Government's evidence at best was circumstantial, the learned trial judge erred in failing to instruct the jury that the Government's proof must be such as to exclude every reasonably hypothesis other than that of guilt. *Garst v. United States,* supra; *Anderson v. United States,* supra; *Stutz v. United States,* supra; *Hanson v. United States,* 208 F. 2d 914, 916. *Shama v. U. S.,* C.C.A. Iowa 1938, 94 F.2d 1, certiorari denied 58 S. Ct. 1037, 304 U.S. 568. *Carneal v. U. S.,* C.A. Va. 1954, 212 F. 2d 20. *O'Day v. Chicago River & Indiana R. Co.,* C.A. Ill. 1954, 216 F. 2d 79; *Wetherbee v. Elgin, J. & E. Ry. Co.,* C.A. Ill. 1951, 191 F. 2d 302. *Edenfield v. U. S.,* C.C.A. Ga. 1940, 112 F. 2d 931. *Sykes v. U. S.,* C.A. Mo. 1963, 312 F. 2d 232, certiorari denied 83 S. Ct. 1551, 373 U.S. 942. *Clark v. U. S.,* C.A. Ala. 1961, 293 F. 2d 445. *Farrar v. U. S.,* C.A. 1960, 275 F. 2d 868, 107 U.S. App. D.C. 204. *Rogue Elec. Mfg. Co. v. Coconut Grove Bank,* C.A. Fla. 1959, 269 F. 2d 1.

Conclusion.

The charge of the trial judge in the instant case leaves considerable doubt as to whether or not the enormity of the burden of proof upon the Government was clear to the jury.

CONCLUSION

It seems, therefore, that your Honorable Court should reiterate and give force to the principle that the preservation of the petitioners' constitutional rights is of greater importance than the easing of the Government's difficulties in a tax evasion prosecution where it has no direct evidence of fraud, especially since the prosecution was started and motivated by the evil intent and hatred of the woman petitioner's sister, whom the record shows was unreliable and unworthy of belief.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

JOHN B. NICKLAS, JR.
McCRADY & NICKLAS
Attorneys for Petitioners

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14756-14757

UNITED STATES OF AMERICA
v.
JOSEPH GRANDINETTI and
THERESA GRANDINETTI
JOSEPH GRANDINETTI, Appellant in No. 14756
THERESA GRANDINETTI, Appellant in No. 14757

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued September 21, 1964

Before: HASTIE and FORMAN, *Circuit Judges;* and KIRKPATRICK, *District Judge.*

Opinion of the Court

(Filed October 14, 1964)

PER CURIAM:

We have examined the record of this trial and conviction on a charge that the defendants filed false and fraudulent income tax returns in a willful attempt to evade their income tax responsibility. The government's showing concerning the defendants' income, though not consistent in all details, was sufficient to demonstrate a substantial understatement of income in each of the years in question. There is also an abundance of evi-

dence of purpose to misrepresent income and thus evade taxes. There were no exceptions to the charge of the court. In these circumstances the record sustains the conviction.

Finally, the court did not abuse its discretion in denying a second postponement of trial more than a year after the defendants had been indicted.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.